NATIONAL LABOR RELATIONS BOARD

WASHINGTON, D.C. 20570

FOR IMMEDIATE RELEASE
Friday, April 19, 1996

R-2134
202/273-1991

CASE WESTERN RESERVE UNIVERSITY
PUBLIC POLICY FORUM

"In the Wake of the Blizzard of '96 and the Government Shutdowns: Part II of the Clinton Board's Decisions"

Delivered by:

William B. Gould IV
Chairman
National Labor Relations Board
Charles A. Beardsley Professor of Law
Stanford Law School (On Leave)

April 19, 1996
Case Western Reserve University
Law School
Room A59
Cleveland, Ohio

I am grateful to Everette J. Freeman of Case Western Reserve University Public Policy Forum for the invitation to speak here in Cleveland today. This gives me a wonderful opportunity to accomplish three objectives in a relatively short period of time.

The first, of course, is to see my beloved Boston Red Sox, who have been limping and staggering a good deal of late, come in to square off against your American League Champion Cleveland Indians. Last September, I was able to speak here at a conference held by the Baker & Hostetler firm and to see the Red Sox split two games with the Indians with my former students, Elliot Azoff and Tom Seger, as well as our Regional Director here, Fred Calatrello.

The rivalry remains intense, bringing to mind my original infatuation with baseball as a young boy in the 1940s when I saw Larry Doby, Joe Gordon, Lou Boudreau, Bob Feller, Bob Lemon and Gene Bearden, along with the venerable (he was supposed to be all of 42!) Satchel Paige, come into Yankee Stadium for a big doubleheader in the midst of a three-way pennant race between the Red Sox, Indians and Yankees in which the Indians ultimately prevailed over the Sox, 8-3, on the final day of the season in the American League's first playoff game. And it is here that the "Williams' Shift" was devised by Boudreau, playing the shortstop on the right field side of second base against the great Ted Williams. Williams always defied the shift, constantly pulling the ball to the right -- though he hit an inside the park homer to left field in the '46 pennant clincher here in Cleveland. He continued to pull hit to the right side until a bad elbow injury sustained just before the '46 World Series induced him to bunt down the third base line for a single in the fall classic against the Cardinals.

Of course, none of this weekend's participants -- not even 41-year-old Dennis Martinez, or old friend backstop Tony Pena -- and certainly not Alan Embree, whose grandfather pitched for the '46 Indians and who lost that Sox '46 pennant clincher here in Municipal Stadium though he threw a 2 hitter -- were even born then, let alone remember such ancient events!

The second objective is that this gives me a great chance to renew contact with so many able practitioners on both the management and labor side here in Cleveland, and to pay tribute to former Senator Howard Metzenbaum, who has been such a good friend and able supporter of me and my Agency, both before and subsequent to my confirmation. I am also grateful to Congressman Louis Stokes, who has been a tireless supporter of the Board on the House Appropriations Committee, Subcommittee for Labor, Health and Human Services, Education and Related Agencies, where he so ably serves.

The third reason, of course, is the principal one for my being here, i.e., to give you some sense of the work that we have been doing at the National Labor Relations Board with particular emphasis upon the decisions that we have rendered in the wake of -- and indeed in the midst of -- the blizzard of '96 and the government shutdowns. While I shall make some reference to a few decisions which we handed down before that period of time, most of those which are significant were discussed by me in a speech that I gave in a

conference last October in Boston.[1] Moreover, I have addressed the issues involved in some of our leading decisions involving and promoting employee participation in a speech that I gave about six weeks ago in Indianapolis.[2] And I have chronicled the issues presented by our rulemaking initiatives as they relate to Administrative Law Judges and the single location unit issue on a number of occasions.[3]

1. Voluntary and Prompt Dispute Resolution

Some of the themes presented in those issues are inextricably bound up with other Board decisions, including those of the past four to five months. As many of you know, my priorities during more than two years in office have been to both promote the voluntary resolution of disputes through settlements and cooperative relationships and to achieve a consensus wherever practicable, as well as to expedite and simplify our procedures for lawyers and lay people alike.

---

[1] See William B. Gould IV, Speech before the National Labor Relations Board Region 1/U.S. Department of Labor Conference co-sponsored by the Massachusetts, Boston and Federal Bar Associations, *The National Labor Relations Board: The Undiscussed Decisions of Our Agency,* October 19, 1995, Boston, Massachusetts; Bureau of National Affairs, DAILY LABOR REPORT 203 A-6; E-6, 10/20/95.

[2] See William B. Gould IV, Speech before the Seventeenth Annual Seminar on Labor-Management Relations sponsored by the National Labor Relations Board Region 25 and Indiana University School of Law Indianapolis, *Beyond 'Them and Us' Litigation: The Clinton Board's Administrative Reforms and Decisions Promoting Labor-Management Cooperation,* February 29, 1996, Indianapolis, Indiana; Bureau of National Affairs, DAILY LABOR REPORT 42:A-1; E-38, 3/4/95.

[3] See e.g., William B. Gould IV, Speech before the Seventeenth Annual Seminar on Labor-Management Relations sponsored by the National Labor Relations Board Region 25 and Indiana University School of Law Indianapolis, *Beyond 'Them and Us' Litigation: The Clinton Board's Administrative Reforms and Decisions Promoting Labor-Management Cooperation,* February 29, 1996, Indianapolis, Indiana; Bureau of National Affairs, DAILY LABOR REPORT 42:A-1; E-38, 3/4/95; Speech before the IRRA's 48th Annual Meeting, *A Tale of Three Agencies: The NLRB Experience,* January 5, 1996, San Francisco, California, reported in Bureau of National Affairs, DAILY LABOR REPORT 6:A-6, 1/10/96; Speech before the State University of New Jersey Rutgers School of Management and Labor Relations Fall State Advisory Council Meeting, *The Work of the Labor Board and the State of the Employment Relationship in America,* November 3, 1995, News Brunswick, New Jersey, reported in Bureau of National Affairs, DAILY LABOR REPORT 214:A-1, 11/6/95; Speech before the 28th Annual Pacific Coast Labor Law Conference, *New Procedures Under the National Labor Relations Act: Some Challenges for the Labor Board,* Seattle, Washington, June 9, 1995; Bureau of National Affairs, DAILY LABOR REPORT 112: A-13; E-10, (6/12/95); and see also William B. Gould IV, *Gould Responds to Republican Charges on Proposed NLRB Single Facility Rule*, Bureau of National Affairs, DAILY LABOR REPORT 74:AA-1, (4/17/96).

One of the most vivid illustrations of these points is presented by our decision in *Douglas-Randall, Inc.*, 320 NLRB No. 14 (December 22, 1995). This case addressed the issue of the effect of a settlement agreement resolving Section 8(a)(1) and (5) charges upon the right of employees to proceed with the decertification petition that was filed prior to the settlement agreement, but subsequent to the onset of the alleged unlawful conduct. As we noted in *Douglas Randall, Inc.*, the Board, historically, had sustained the dismissal of such a decertification petition when the settlement agreement included a provision obliging the parties to bargain with one another. The dismissal was implemented because under then-settled Board policy the employer and union were viewed as being entitled to a reasonable period of time within which to effectuate the provisions of the settlement agreement free from rival claims and petitions. The Board viewed consideration of the decertification petition as an erosion of the settlement agreement which would not allow the agreement to achieve its purpose.

In *Poole Foundry & Machine Company*[4] the U.S. Court of Appeals for the Fourth Circuit had noted that few of such agreements would be negotiated if, subsequent to a solemn promise to bargain with the union, the employer could immediately escape the obligation on the basis of the decertification petition. If this view was not followed, the settlement agreement would have little practicable effect as an amicable and judicious means to expeditious disposal of disputes arising under the terms of the Act.

As we noted in *Douglas-Randall, Inc.*, the Board followed this approach for many years and only in the mid-'80s did it begin to retreat from these principles. In *Passavant Health Center*, 278 NLRB 483 (1986), the Board reinstated a decertification petition and held that a subsequent collective bargaining agreement did not bar reinstatement of the petition when the complaint was withdrawn and the terms of the settlement satisfied. Subsequently, in *Island Spring*, 278 NLRB 913 (1986), a Board majority held that it was appropriate to reinstate a decertification petition when unfair labor practice allegations had been resolved pursuant to a settlement agreement and the employer had complied with the agreement. The Board majority held that the absence of a nonadmission clause did not warrant a contrary result from that reached in *Passavant* noting that, as in *Passavant*, the employer had neither admitted the charges nor been found in violation of the Act. The Board stated in subsequent cases, *Nu-Aimco, Inc.*, 306 NLRB 978 (1992), and *Jefferson Hotel*, 309 NLRB 705 (1992), that a decertification petitioner was not bound by a settlement by others that had the effect of waiving the petitioner's rights under the Act.

In *Douglas-Randall, Inc.*, we moved the Board's position back to the original line of authority which had been followed for many years. Said the Board in *Douglas-Randall, Inc.*:

> The Board's reasoning in [. . . its decisions of the 1980s] . . . is technically accurate insofar as it observes that settlement of an outstanding unfair labor practice allegation is not the same as

---

[4] 95 NLRB 34 (1951), enfd. 192 F.2d 740 (4th Cir. 1951), cert. denied 342 U.S. 954 (1952).

> an admission by a charged party, or adjudication by the Board, that an unfair labor practice has been committed. As *Poole* pointed out, however, a settlement also is not the same as a dismissal of that unfair labor practice allegation. In our view, *Passavant* and its progeny extended a logical premise too far.

The Board noted that *Passavant*:

> . . . could lead to the very evil the Fourth Circuit predicted: it permits an employer to commit an unfair labor practice by refusing to bargain collectively with an incumbent union, sign a settlement agreement undertaking to bargain with that union, and then benefit from its unlawful conduct by having the union decertified or replaced because of dissatisfaction with the incumbent union arising from the unfair labor practice.

We pointed out that the policy of the '80s had "unduly" complicated the administration of the Act inasmuch as the decertification petitioner is brought into the conflict to resolve the decertification petition as part of the settlement agreement. Reinstatement of the petition, we said, undermined the very agreement which the parties have executed. What is at stake in these cases is an agreement by employers to settle in order to avoid costly litigation when the General Counsel has found probable merit to the charge or " . . . is considered likely to make that finding." The union is agreeing to settle the unfair labor practice charge in exchange for the right to achieve recognition and bargaining to which they claim they are entitled. Under the approach of the 1980s we observed that: "[u]nions are understandably reluctant to settle, while some employers are eager to settle because settlement clears the way for resumption of decertification efforts, despite any potential effects of the previously alleged employer unfair labor practices."

Thus, the union would not want to enter into a settlement agreement if it thought that its part of the bargain would be lost. We noted that in any event the petitioner would be barred if the matter went to litigation regardless of the wishes of any party. Thus, we concluded that *Passavant* and its progeny should be overruled so that we could foster ". . . stable labor relationships . . . peaceful settlements . . . and [the process of] collective bargaining."

The theme in *Douglas-Randall, Inc.* is similar to that contained in much of our other work. Our rulemaking relating to Administrative Law Judges has created a new corps of settlement judges who can mediate and conciliate without the authority to adjudicate. In *Management Training*, 317 NLRB 1355 (1995), a decision rooted in the statute's exclusion of public sector employers, we asserted jurisdiction over government contractors on the ground that the assertion of jurisdiction is appropriate when the parties are in the private

sector and, as a result, litigation over when jurisdiction would be asserted was diminished considerably or conceivably altogether.

Douglas-Randall, Inc., *Management Training*, and our rulemaking relating to Administrative Law Judges -- and, indeed, our proposed rulemaking on single unit locations by virtue of the clear rights and obligations for labor and management established in this process -- all diminish unnecessary litigation which is a burden to both the taxpayers and private parties. All of these initiatives, through both adjudication and rulemaking, are designed to promote an environment where, consistent with the policies of the Act, the parties are encouraged to rely upon their own resources and not those of government.

Another representation case gave us the opportunity to articulate the same approach. However, the chance was lost in *Smith's Food & Drug Centers, Inc.*, 320 NLRB No. 67 (February 13, 1996), where we considered the question of whether the employer's voluntary recognition of an intervenor or union will bar subsequent petitions that are not supported by a 30-percent showing of interest as of the time of recognition. A majority of the Board held that in rival union initial organizing situations, a voluntary and good faith recognition of a union by the employer is valid unless the petitioner demonstrates a 30 percent showing of interest that predates recognition. Said the Board:

> Where such interest is shown, an election is warranted in order to guarantee employees an opportunity to express their desires in a definitive manner.

In *Smith's Food*, I wrote a concurring opinion in which I agreed that the employer's recognition was barred -- but I would have overruled *Rollins Transportation System*, 296 NLRB 793 (1989), in favor of a policy barring any petition filed after the voluntary recognition of a union as long as the recognition is based on a verified showing of majority support and exists with no showing of employer coercion or assistance.

In articulating my view, I sounded a number of these themes, some of which were present in the areas to which I have alluded -- and some of which were set forth in my opinions dealing with collective bargaining in multiemployer associations which I wrote in '94 and '95. In those cases, you may recall, I voted with 3-2 majorities to promote reliance upon the parties' own procedures.[5]

---

[5] See, *Lexington Fire Protection Group, Inc.*, 318 NLRB No. 32 (August 15, 1995), *James Luterbach Construction Co., Inc.*, 315 NLRB 976 (1994), and *Chel LaCort*, 315 NLRB 1036 (1994). As I said in *Lexington Fire Protection Group, Inc.*:

> The fact that it may not be the most efficient or best in the view of this Agency or other third parties is irrelevant. It is the process devised by the parties, which they have bargained for, that supports our decision today and not our own view about what is best for them.

As I said in *Smith's Food*:

> The establishment of a successful collective bargaining relationship is best accomplished by the parties themselves -- the employer, the union, and the unit employees. The Board should refrain from involving itself in this process unless such involvement is clearly warranted for the protection of statutory rights. In initial organizing situations, most employees who do not already understand their rights and the workings of the organizational process will take the steps necessary to educate themselves concerning these matters. Unions and employers, therefore, should be entitled to accord full weight to employees' expressions of their desires through signed authorization cards and should be encouraged to enter into recognition agreements in reliance on them.

Thus, I would have left this matter of recognition disputes to the parties themselves where they have acted lawfully and would have expedited our representation process as a result of this approach. Here we can implement the purposes of the Act through reliance upon the parties themselves, expedite our procedures and stay the hand of government in recognition disputes -- just as we have done with unfair labor practices through the use of our new settlement judges. As I stated:

> The Board provides no benefit to these employees by delaying the implementation of their designation in order to reconfirm through an election the desires that they have already expressed.

The answer for employees who do not believe that free choice has been realized is to test the matter through unfair labor practice proceedings under Section 8(a)(2) where necessary and appropriate. My view, again from *Smith's Food*, is that:

> . . . the Board must proceed on the assumption that employees are competent to function in the environment of union organizing campaigns and must resist the temptation to second-guess the choices made by the parties.

2. <u>The Parameters of Existing Supreme Court Authority and the Board</u>

In three different areas, we attempted to fill in some of the gaps left unresolved by Supreme Court decisions. The first of these relates to cases in which the supervisory status of registered nurses is in dispute. In *NLRB v. Health Care & Retirement Corp.*, 114 S. Ct. 1778 (1994), a decision which rejected the approach employed by my predecessors on this issue, the Court left open for the Board the question of how the Board should interpret

"assign," "responsibly to direct," "routine," and "independent judgment" and how it should harmonize the provisions of Section 2(11) and (12). The tension between these provisions exists by virtue of the fact that the statute provides for coverage of professional employees and, at the same time, excludes supervisors. In two cases, *Providence Hospital*, 320 NLRB No. 49 (January 3, 1996), and *Ten Broeck Commons*, 320 NLRB No. 65 (February 2, 1996), the Board considered this question anew in light of the Court's invitation to do so in *Health Care.*

In *Providence Hospital,* the Board observed that Congress, when enacting Section 2(11) had distinguished between true supervisors and straw bosses who perform "minor supervisory duties." The Board pointed out that there was no contention that the registered nurses here had the authority to hire, transfer, suspend, layoff, recall and promote, discharge, reward or discipline other employees or to adjust their grievances or to effectively recommend such action. The only issue was whether these registered nurses "responsibly direct and assign employees and that their exercise of such authority requires the use of independent judgment." The Board noted the difficulty in resolving the question of whether Section 2(11) speaks to the authority to assign employees or involves the assignment of tasks, but stated that this issue need not be resolved, because the authority used by registered nurses here did not amount to independent judgment within the meaning of Section 2(11).

In *Providence Hospital*, the Board also addressed the question of what constituted the responsibility to direct employees. Reviewing the precedent of the past 40 years the Board said that Section 2(11) supervisory authority does not include the authority of an employee to direct another to perform:

> . . . discrete tasks stemming from the directing employee's experience, skills, training, or position, such as the direction which is given by a lead or journey level employee to another or apprentice employee, the direction which is given by an employee with specialized skills and training which is incidental to the directing employee's ability to carry out that skill and training, and the direction which is given by an employee with specialized skills and training to coordinate the activities of other employees with similar specialized skills and training.

Under the circumstances of *Providence Hospital,* we agreed with the Regional Director that the record evidence did not establish that the RN charge nurses' assignment of the registered nurses was anything more than a "routine clerical task" and thus it did not require the independent judgment invoked by the statute. Further, with regard to direction, we also agreed with the Regional Director that the direction did not involve the use of independent judgment and, again, was routine or clerical.

In *Ten Broeck Commons*, following the lead of *Providence Hospital*, we again looked at whether independent judgment was exercised by LPNs and found that they did not exercise such judgment in making assignments or directing the work of certified nursing assistants. In both cases we recognized that independent judgment was required and that an examination of the peculiar facts would be necessitated. We have provided considerable guidance -- but we have not been able to fashion a generalized rule on the legal issues which is directly akin to the approach taken to the issues already discussed -- rules which would substantially diminish litigation as we did in *Douglas-Randall, Inc.*, *Management Training*, and our rulemaking exercises.

In *A.P.R.A. Fuel Oil Buyers Group, Inc.*, 320 NLRB No. 53 (December 21, 1995), we again dealt with Supreme Court authority and how to apply it -- this time within the context of the vexatious and sometimes emotionally charged issue of the coverage of the relationship between illegal aliens and statutory coverage in our Act. In *NLRB v. Sure-Tan, Inc.*,[6] the Court, speaking through Justice O'Connor, held that illegal aliens or undocumented workers are employees within the meaning of the Act. The reasoning of the Court was that the exclusion of undocumented alien employees from participation in union activities and the protection against employer intimidation would create a kind of subclass of workers which would erode the unity of all employees and impede effective collective bargaining.

The question in *A.P.R.A.* was whether backpay and traditional make whole remedies could be awarded to undocumented employees who are the victims of unlawful discrimination. The Board ordered reinstatement of such workers, conditioning it upon their ". . . production, within a reasonable time, of documents enabling the Respondent to meet its obligation under IRCA [the Immigration Reform and Control Act of 1986] to verify their eligibility for employment in the United States."

We held that backpay would be tolled as of the date the discriminatees are reinstated or when, after a reasonable period of time, they are unable to produce the documentation which would enable employers to meet their obligations under IRCA. We noted that Congress had expressly indicated that the policies underlying both the National Labor Relations Act and IRCA reinforced one another.

In *Sure-Tan*, the Court had recognized that both labor law and immigration law were intertwined -- although the Immigration and Nationality Act, IRCA's predecessor, while prohibiting unlawful entry into the United States, did not specifically prohibit employers from hiring persons who had entered the country illegally as does IRCA. In *Sure-Tan*, the employees, facing deportation, left the United States when an INS investigation was requested by the employer.

As we noted in *A.P.R.A.*, the Court had stated that a "key purpose" of immigration restrictions is "to preserve jobs for American workers" and that coverage of undocumented

---

[6] 467 U.S. 883 (1984).

workers helps to insure reasonable working conditions by "decreasing competition from aliens willing to accept substandard wages and employment conditions." We also said that the Court had found that this coverage:

> . . . eliminates the distinct economic advantage and thus the incentive to employers of hiring illegal aliens in preference to American citizens or alien employees working lawfully. A reduction in the availability of jobs to undocumented aliens, the Court found, would in turn discourage many aliens from entering the United States illegally.

In *A.P.R.A.*, we noted that the Court, in a decision 10 days after *Sure-Tan,* had characterized its holding as permitting the imposition of retrospective sanctions where unfair labor practices are committed, but withholding prospective relief while the employees remained undocumented. The Ninth Circuit had stated that the question of backpay eligibility had not been addressed in situations where the employees remained in the United States and thus the relevant labor market. Accordingly, the Board concluded that Congress had clearly directed us to persist in providing remedies. We thus conditioned reinstatement upon a verification of eligibility requirements as required by IRCA. In considering the backpay issue, we pointed out that the employees had informed the employer of their unauthorized immigration status when they were interviewed and that their discharge was not a result of their status, but rather of their support for the union. Accordingly, we ordered backpay from the date of discharge to the earliest date of the following: either their reinstatement, subject to compliance with normal obligations under IRCA, or their failure, after a reasonable time, to produce documents establishing eligibility.

The third area of Supreme Court decisions involved application of the Court's holding in *Communications Workers v. Beck*, 487 U.S. 735 (1988), where the Court held that the Act does not permit a collective-bargaining representative, over the objection of dues-paying nonmember employees, to expend funds collected under a union-security agreement on activities unrelated to collective bargaining, contract administration, or grievance adjustment. In *California Saw and Knife Works*, 320 NLRB No. 11 (December 20, 1995), and *Weyerhaeuser Paper Co.*, 320 NLRB No. 12 (December 20, 1995), the Board addressed some of the issues that were left unresolved by *Beck.*

In *California Saw and Knife,* we held that a union breaches its duty of fair representation when it fails to inform newly hired nonmembers of their *Beck* rights at the time that the union first seeks to obligate these workers to pay dues. We said that a union meets its obligation ". . . as long as it has taken reasonable steps to insure that all employees whom the union seeks to obligate to pay dues are given notice of their rights." The Board stated that the obligation requires the union to inform employees that they have a right to remain a nonmember and that nonmembers have a right to (1) object to paying for activities which are not germane to the union's duties as bargaining agent and to obtain a reduction in fees for such activities; (2) to be given sufficient information to enable the

employees to intelligently decide whether to object; and (3) to be apprised of relevant and internal union procedures for filing objections. When an employee chooses to object, we held, he or she must be apprised of the percentage of the reduction, the basis for the calculation, and the right to challenge these figures.

We held that a union could advise employees through a union newspaper and we noted, in the case in question involving the IAM, this was not ". . . a case where a union's publication notice of its *Beck* policy is hidden in a lengthy publication such that, without a cover notation, a nonmember employee making any reasonable perusal of the publication would likely not be alerted to the *Beck* policy."

Also at issue in *California Saw* was the question of whether the IAM policy of requiring that objections be filed during the month of January, a so-called "window" period, was an unlawful restriction upon the right to resign and thus the right of *Beck* objectors to protest. The Board concluded that this was unlawful -- although I noted in the decision and have written elsewhere that the right to resign is not fundamental under the Act and that the Board is free, as an expert agency, to reconsider the *Pattern Makers* ruling that there is an absolute right to resign.[7]

We also held that a union is not required to calculate its *Beck's* dues reductions on a unit-by-unit basis -- and that litigation expenses are properly charged to dues protesters even where they involve issues beyond the bargaining unit itself. The Board stated:

> We thus hold that a union does not breach its duty of fair representation by charging objecting employees for litigation expenses as long as the expenses are for 'services that may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization.' We believe that this narrowly tailored approach is consistent with the Congressional intent in enacting the first proviso to Section 8(a)(3) -- to avoid the problem of 'free riders' -- in those circumstances where the union undertakes litigation on behalf of one bargaining unit which is likely to benefit other bargaining units.

In *Weyerhaeuser Paper Co.*, we held the obligation to notify employees of their *Beck* rights extends to union members as well as nonunion employees -- the right of nonunion employees being at issue in *California Saw*. Specifically, we held that union members can only be aware of their right to be nonunion members -- and thus free from the right to have their dues spent for non-germane purposes -- if they are aware of their right to resign. Generally, employees under a collective bargaining agreement which obliges individuals to become "members" are not aware of the fact that this requirement does not, under law,

---

[7] William B. Gould IV, *Solidarity Forever - or Hardly Ever: Union Discipline, Taft Hartley and the Right of Union Members to Resign,"* 66 CORNELL L. REV. 74 (1980)

mean full membership as opposed to the payment of initiation fees and dues. Whatever the statute's policy deficiencies, my judgment is that *Weyerhaeuser* is consistent with the law and gives union members valuable information which they would not otherwise possess -- and it is information to which they are entitled under the statute.

Accordingly, in the arena of the obligations of the union to dues payment protesting workers, undocumented employees, as well as nurses where their supervisory status is in dispute, we were operating within the well-defined parameters of Supreme Court decisions.

3. The Duty to Bargain and Economic Pressure

Curiously, this was not the case in *RBE Electronics of S.D., Inc.*, 320 NLRB No. 8 (December 18, 1995), where the major issue was an employer's obligation to refrain from unilateral changes and the circumstances where, when parties are engaged in collective negotiations, there is a duty to refrain from the implementation on a particular issue absent overall impasse on bargaining for the agreement on a whole. The issue thus presented in *RBE Electronics* is the circumstances under which federal labor policy permits piecemeal bargaining. The issue is basic and one would think that it had been addressed by the Court years ago -- but this is not the case!

The Board, in *Bottom Line Enterprises*, 302 NLRB 373 (1991), articulated the general proposition that normally unilateral implementation must not be engaged in until an overall impasse has occurred -- but the Board stated that there are two exceptions: when a union engages in tactics designed to delay bargaining, and when economic exigencies compel prompt action. In both *RBE Electronics* and *Bottom Line,* the Board noted that the economic exigency exception is derived from the Court's holding in *NLRB v. Katz*, 369 U.S. 736 (1962), to the effect that unilateral changes are condemned and thus ". . . essentially condemn piecemeal bargaining" but support the view that ". . . there might be some circumstances justifying or excusing an employer's taking action while bargaining is ongoing." The Board noted that there are certain compelling economic considerations which have excused bargaining altogether. A majority of the Board stated that there are ". . . other economic exigencies, although not sufficiently compelling to excuse bargaining altogether, that should be encompassed within the *Bottom Line* exception. These would be situations which require "prompt action" for which bargaining is appropriate and cannot await the ultimate resolution that would flow full-fledged contract bargaining. Under these circumstances, we said, the employer will satisfy its statutory obligation to bargain by providing the union with adequate notice and an opportunity to bargain. Consistent with the approach that the Board has employed where negotiations are not in progress, where there is waiver of the right to bargain by the union, or where the parties reach an impasse, the employer can act unilaterally.

Although I signed the majority opinion, I expressed the view set forth in two footnotes that an employer should be allowed to engage in piecemeal bargaining only where the circumstances are such that there is "compelling and substantial justification for individual bargaining . . . ." My view of federal labor policy, as reflected by the Supreme

Court's decision in both *Katz* and also the *Steelworkers Trilogy,* is that bargaining inevitably involves a wide variety of issues where there is give and take and that concessions are made on one item as a *quid pro quo* for promises in another. To the extent that this process is undermined through piecemeal bargaining, we do violence to the philosophy of industrial jurisprudence which the Supreme Court supported in *Steelworkers Trilogy.* For these reasons, I expressed the view that the exception could be allowed only in narrow circumstances.

In another duty to bargain case, *The Daily News of Los Angeles,* 315 NLRB 1236 (1994), enforcement granted 151 LRRM 2242 (D.C. Cir. 1996), *Katz* also was implicated by virtue of the issue presented, i.e., whether an employer which unilaterally withheld annual wage increases from employees during negotiations with the union for an initial contract had engaged in a bad faith refusal to bargain. *Katz* was different from *The Daily News of Los Angeles* in the sense that it involved the employer's unilateral continuance of a merit wage program. We stated that in the cases involving unilateral actions relating to changes in working conditions, none of them appeared to be determinative based upon whether there was continuance or discontinuance of a program. We said the *Katz* doctrine:

> . . . neither distinguishes among the various terms and conditions of employment on which an employer takes unilateral action nor does it discriminate against on the basis of the nature of a particular unilateral act. It simply determines whether a change in any term and condition of employment has been effectuated, without first bargaining to impasse or agreement, and condemns the conduct if it has.

In reaching our conclusion in this case, we overruled a previous decision from 1982[8] which excused bargaining where the raises were discretionary, the parties had begun to bargain about wages during negotiations and the union did not unconditionally agree to the wage increase.

Finally, in *The Daily News of Los Angeles,* we also rejected the proposition that the use of economic weaponry contained in the so-called freedom of contract cases like *Insurance Agents*[9] and *American Ship Building,*[10] was analogous to the issue presented here. The key in the economic tactics or pressure cases is whether the party involved is actually willing to negotiate. Those cases state that the use of economic pressure cannot, per se, be equated with a refusal to bargain. Accordingly, they keep the Board out of the regulation of economic tactics and at the same time promote actual agreement by regulating unilateral action.

---

8 *Anaconda Ericcson Inc.*, 261 NLRB 831 (1982).

9 *NLRB v. Insurance Agents International Union*, 361 U.S. 477 (1960).

10 *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965).

Another case in which the lockout issue was presented is *International Paper Company*, 319 NLRB No. 150 (December 18, 1995). This case involved the employer's entering into a permanent subcontract to perform maintenance work previously performed by bargaining unit employees during the lockout itself. As with the previous two cases discussed, here we noted that the Supreme Court had not yet had occasion to address the precise issue presented here -- the subcontracting out of work on a permanent basis in order to bring pressure to bear in support of its bargaining position in contract negotiations.

We held in *International Paper* that the permanent subcontracting of jobs in the context of a lockout was unlawful inasmuch as it was inherently destructive because the workers would not be able to return to their jobs. There was no way, as in the lockout cases decided in which the Supreme Court had allowed such tactics, for them to resolve the issue in dispute by simply agreeing to the employer's terms. Said the Board:

> The Respondent's permanent subcontracting rendered nugatory the exercise of these statutory rights by those unit employees faced with permanent loss of employment and employee status. There can, of course, be no greater obstacle to the exercise of employee rights than permanent loss of employment and employee status.

We noted that the use of this tactic would be likely to hinder future collective bargaining. We also noted that in contrast to workers who are permanently replaced through exercise of the right to strike, employees displaced by permanent subcontracting of unit work have no recall or voting rights. In deciding this case, we did not address the issue of whether a temporary replacement of locked out workers violates the statute. Here the replacement was permanent.

4. Other Representation and Unfair Labor Practice Issues

In *Sunrise Rehabilitation Hospital*, 320 NLRB No. 28 (December 19, 1995), we dealt with a recurring problem that was publicized when the basketball owners provided expenses for the National Basketball Association players to participate in our NBA election last fall, i.e., the circumstances under which employees who will not be able to vote by being at the worksite can receive financial assistance which allows them to cast their vote. In *Sunrise Rehabilitation Hospital*, we overruled prior authority[11] by concluding that " . . . monetary payments that are offered to employees as a reward for coming to a Board election and that exceed reimbursement for actual transportation expenses amount to a benefit that reasonably tends to influence the election outcome."

---

[11] *Young Men's Christian Assn.*, 286 NLRB 1052 (1987).

We noted that prior Supreme Court authority[12] held that employees understand the inference that the source of benefits might dry up if the wishes of the grantor were not obliged. In the circumstances of this case we stated that the benefit was substantial and that monetary payment was not linked in any way to transportation expenses. It is the "something extra" which under appropriate circumstances is impermissible. We also noted that a flyer urging workers to Vote No was distributed to most employees and thus the impact of the promise of benefits, i.e., a fully-staffed child care facility, was considerable.

The context in which the employees might construe the offer was one of the Vote No campaign and Vote No hand bill, as noted above, the lack of any link to transportation expenses. As we said:

> . . . We find that employees would reasonably perceive the two hours' pay as a favor from the employer which the employees might feel obligated to repay by voting against the union, as the employer requested.

Particularly in a time when part time or temporary workers may not be at the poll on election day (a factor which sometimes warrants a mail or postal ballot),[13] it is important that they -- and even those employees who have considerable income of their own like the NBA players to which I have referred -- receive transportation expenses. But this must be limited and not become a bribe-like benefit which would be impermissible in the political context, let alone the employment relationship where one party is frequently dependent upon the other.

In *Paper Mart*, 319 NLRB No. 3, (September 20, 1995), the Board unanimously reversed the Administrative Law Judge's ruling that the complainant's discharge was legal although the company had violated 8(a)(1) by issuing a written warning to the complainant against soliciting employees and passing out union literature "on company time or on company premises." The ALJ held that the complainant was discharged because he was believed by the company to have "intrudingly" acquired and misused confidential information about the salary of another employee. The judge held that the company would have discharged the employee even in the absence of the complainant's protected activities.

The Board disagreed, holding that the respondent had not met its burden of showing that the complainant would have been terminated absent his protected activity and that the company violated 8(a)(3) as well as 8(a)(1). The respondent was ordered to reinstate the employee and make him whole for any loss in earnings.

---

12 *NLRB v. Exchange Parts*, 375 U.S. 405 (1964).

13 *Shepard Convention Services, Inc.*, 314 NLRB 689 (1994).

In my concurring opinion I stated my reservation about the portion of *Wright Line,*[14] which provides that an employee not be reinstated if a preponderance of the evidence shows that the employee would have been discharged even in the absence of engaging in protected activity. As I stated in my opinion, Justice White's opinion for the Supreme Court in *NLRB v. Transportation Management Corp.*[15] stated that the route not taken by the Board in that case, i.e., that a violation can be made out simply on the basis of "mixed motives" by the employer, was a permissible interpretation of the Act.

Underlying my view is the relationship between remedy and liability. That is to say, the driving force behind the limited view of liability in *Wright Line* is the assumption that misbehaving employees will be foisted upon employers or will obtain windfalls if good reasons, as well as bad, permit a violation to be sustained.

Thus, I would follow the lead set forth by Congress when, through the Civil Rights Act of 1991, it employed a similar approach.[16] This would promote -- as it has with the Civil Rights Act of 1991 -- a more careful examination of appropriate remedies. I think that the Act would benefit from more flexible remedies.

Arbitrators, albeit resolving disputes with the terms of a collective bargaining agreement, will frequently provide for reinstatement with no backpay or partial backpay. In *Safeway Stores Inc.*, 64 LAB. ARB. 563 (1974), I held that backpay without reinstatement could be appropriate under the agreement in question. Sensible creativity in fashioning remedies would allow for a more dispassionate and logical analysis of the liability issue and, in my view, a reversal of *Wright Line* itself.

CONCLUSION

The blizzard of '96 and the government shutdowns were a period in which we finalized many cases. We are still paying the penalty for those shutdowns by virtue of days lost since that will slow down the issuance of both representation and unfair labor practice cases which are before us. But the decisions which we issued are an important part of federal labor policy -- and may not have received adequate attention given the focus upon the ongoing budget debate and lack of coverage during this period in which government was moribund.

---

[14] 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[15] 462 U.S. 393 (1983).

[16] I have set forth similar views in the context of Title VII of the Civil Rights Act of 1964. See William B. Gould IV, *The Supreme Court and Employment Discrimination Law in 1989: Judicial Retreat and Congressional Response*, 64 TUL. L. REV. 1485, 1502 (1990); William B. Gould IV, *The Law and Politics of Race: The Civil Rights Act of 1991*, 44 LAB. L.J. 323, 337 (1993). These views were specifically adopted by Congress in the Civil Rights Act of 1991. Civil Rights Act of 1991, § 107, 42 U.S.C.A. § 2000e-2(m) and § 2000e-5(g)(2)(B) (West 1994).

But all too frequently, our decisions are overlooked by the public and sometimes the legislators who are concerned about our other policy initiatives. The cases that we issue are an integral part and, indeed, the essence of the Board's work. It is important that the public know more about this process.

These cases have issued this past winter -- and we reflect upon them and their meaning as I draw near to the mid-point of my term of office. More contentious and significant policy issues lie ahead -- issues which involve the new workforce, the global economy and matters which we cannot completely foresee here in Cleveland today.

On this first anniversary of the Oklahoma City tragedy, more than ever, it is important for us to rededicate ourselves to the rule of law in the workplace. The National Labor Relations Act contains numerous and substantial deficiencies -- many of which have been addressed by a number of scholars over the years. But the Act itself is a principled vehicle to substitute law and order for strife and divisiveness. And, I believe that the National Labor Relations Board is an important vehicle toward the achievement of this objective.

I look forward to these and other challenges which lie ahead. In this way, to paraphrase President Theodore Roosevelt, it is inevitable that the debate about significant policy issues takes place in the frequently disputatious public arena. In any event, I intend to properly fulfill the promise that I made to President Clinton and the American people to faithfully discharge my duties and responsibilities involved in the impartial administration and interpretation of this Act. The road ahead is a challenging one and I look forward to cooperation and dialogue with you here today and all other interested parties on all sides of the bargaining table throughout the United States.

# # #